APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DENYING PETITION FOR REHEARING AND REHEARING EN BANC, DATED FEBRUARY 11, 1998

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 97-4541

DENISE GRAFF,

Plaintiff/Appellant,

vs.

V & M ERECTORS,

Defendant/Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____ F.2d _____).

Before DUBINA, Circuit Judge, FAY and KEITH*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no

member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

*Honorable Damon J. Keith, Senior Circuit Judge for the Sixth Circuit, sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED DECEMBER 15, 1997

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 97-4541

D. C. Docket No. 96-8002-CIV-KLR

DENISE GRAFF,

Plaintiff/Appellant,

vs.

V & M ERECTORS,

Defendant/Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(December 15, 1997)

Before DUBINA, Circuit Judge, FAY and KEITH*, Senior Circuit Judges.

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*Honorable Damon J. Keith, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM:

We affirm the district court's grant of summary judgment in favor of the defendant and against the plaintiff based on the district court's well-reasoned order filed on March 19, 1997.

Affirmed.

APPENDIX C — MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MARCH 19, 1997

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 96-8002-Civ-Ryskamp

DENISE GRAFF,

Plaintiff,

vs.

V & M ERECTORS,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This Cause came before the Court upon defendant's Motion for Summary Judgment [DE 24], filed January 15, 1997, and plaintiff's Motion to Strike [DE 45], filed February 18, 1997. The motions have been fully briefed.

I. BACKGROUND

In April of 1994, Vern Nix, the sole owner of defendant V & M Erectors ("V&M"), hired plaintiff Denise Graff as an apprentice iron worker. Graff Depo, at 31, 37; Nix. Depo. at 4. During her first five weeks on the job, she worked under the supervision of Larry Clements. Graff

Depo. at 57. Plaintiff experienced no sexual harassment during that time period. *Id.* At the end of the five weeks, plaintiff moved to a different job site located in Broward County. *Id.* at 58. Now she worked under the supervision of a new foreman, Dave Sargent,[1] and, according to plaintiff, her troubles began. *Id.*

Ms. Graff alleges that from the first day on her new assignment Dave Sargent created "a very cold environment, very uncomfortable." *Id.* at 72. The first day nobody would talk to her, and, as of the second day, Mr. Sargent would leave plaintiff standing around, "and give [Ms. Graff] dirty looks, tell the guys that he wanted [Ms. Graff] off his crew, didn't want no women working on his crew." *Id.* at 73.[2] As time passed, Dave Sargent further harassed Ms. Graff by placing her into an "unsafe environment." *Id.* at 87. This unsafe environment involved Mr. Sargent's demands that Ms. Graff lift the weight that he was lifting, which was more than she could lift. *Id.* It also involved his demand that she work in dangerous storm conditions. *Id.* at 88. According to Ms. Graff, she alone was required to perform dangerous jobs. *Id.*

Ms. Graff first complained about her treatment to V & M superintendent Jimmy Sutton.[3] *Id.* at 90.

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[1] As foreman, Mr. Sargent did the same sort of work as Ms. Graff. Sargent Depo. at 45.

[2] Ms. Graff never actually heard Dave Sargent say that he did not want women on his crew, but learned of his attitude toward women from other employees. Graff Depo. at 82.

[3] Ms. Graff must have made her first complaint sometime in the middle of June, because she testified in her (continued...)

According to Mr. Sutton, he bore the responsibility of making sure that jobs ran acceptably and of tracking, materials. Sutton Depo. at 5. Although Mr. Sutton was "second in command" at V & M, he had no authority to assign employees to particular jobs, or to hire or fire. *Id.* at 5, 8. Mr. Sutton acknowledged that employees with complaints could voice their concerns to Mr. Sutton. Sutton Depo. at 9. According to Mr. Nix, when he spoke with Ms. Graff at the time of her hiring, he informed her that if she experienced any harassment or discrimination, she should report it either to the foreman or to Mr. Sutton, and failing satisfaction there, to himself. Nix. Aff. ¶ 2.

In response to Ms. Graff's complaints, Mr. Sutton informed her that she need not lift overly heavy weights. He declined, however, to transfer her back to Mr. Clements's crew because that crew did not need more workers. Graff Depo. at 91-93. Mr. Sutton apparently spoke to Dave Sargent about Ms. Graff's treatment, but her working conditions did not improve. *Id.* at 91. Indeed, according to plaintiff, they grew much worse.

Up until the complaint to Mr. Sutton, the alleged abuse had been verbal only. Beginning the following day, it became physical as well. According to plaintiff, the new offender was not her foreman, Dave Sargent, but his brother, Ray. Apparently prompted by plaintiff's complaint to Mr. Sutton, Ray began to engage in verbal abuse, such as commenting on the color of Ms. Graff's bra, and physical abuse, such as grabbing her shoulder

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[3](...continued)
deposition that she made her second complaint, which was not even a month after the First one, in the middle of July. Graff Depo. at 120.

and buttocks. *Id.* at 95. Ms. Graff responded by uttering, profanities at Ray, and complaining to Dave. *Id.* at 98. Dave said that he would reprimand Ray, but plaintiff believes that he never did, because Ray's conduct only grew worse. *Id.* Ray began recounting his sexual life to plaintiff, and making inappropriate comments about Ms. Graff menstrual cycle. *Id.* at 99. On one occasion, Ms. Graff offered her sympathy over a miscarriage suffered by Ray's girlfriend, and he responded by saying that he was happy that the baby had died. *Id.* at 101. Throughout her verbal and physical abuse, Ms. Graff indicated strongly to Ray that this conduct was unwelcome. *Id.* at 105.

In the middle of July, 1994, Ray allegedly grabbed Ms. Graff's breast. *Id.* at 121. At first she complained to Dave, who responded by saying "that's just my brother... Just the way he is." *Id.* at 122. Plaintiff then complained a second time to Mr. Sutton. *Id.* at 120. At this time Mr. Nix was out of town on vacation, and Mr. Sutton said that he would take care of the situation. *Id.* at 122. Mr. Sutton called Ms. Graff later that same evening and told her that he had gone over to the Sargents' house and told them to keep their hands off her. *Id.* at 123. Ms. Graff believes that Mr. Sutton did in fact go to the Sargent's house and warn them against harassing her, but that they did not obey his instructions. *Id.* Shortly thereafter, in the first part of August, Ms. Graff was working alone on a bridge with Ray, when he threatened to rape her if she didn't "straighten up and quit having an attitude." *Id.* at 125.

After the alleged rape threat, Ms. Graff complained to Mr. Sutton a third time. This time he contacted Mr. Nix, who was still out of town. *Id.* at 123. In response to the allegations, Mr. Nix directed that Ms. Graff be moved to a new work site in Golden Glades, pending his return.

Id. at 124. Even here the alleged harassment did not end. According to plaintiff, Ray and Dave appeared inexplicably at the Golden Glades site. *Id.* Ray then drew a picture of male and female genitals on a plank, captioned them with his and Ms. Graff's names, and displayed his creation to others working in the area. *Id.* at 126-27, Graff. Depo. II at 54.

Ms. Graff finally got the chance to air her grievance in a face-to-face conversation with Mr. Nix on August 15, 1994. Plaintiff left the meeting with the impression that Mr. Nix did not care about her complaint. *Id.* at 40. He allegedly told her "to quit crying [and] that he'd take care of it." Graff Depo. at 65-66. Ms. Graff stated that she was going to leave work until August 23, and that she wanted the situation resolved before her return. *Id.* at 70. She left, but never returned.[4]

II. LEGAL STANDARD ON A MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) sets forth the standard governing summary judgment. In its most basic form, summary judgment is appropriate where there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S, 242, 247-48 (1986) ("the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material*

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[4] Subsequent to Ms. Graff's departure from the job, Mr. Nix launched an investigation of her complaints. Although the parties dispute the sufficiency of these investigations, the Court finds this to be an irrelevant issue, for reasons explained below.

fact.") (emphasis in original).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has met its burden, the party opposing summary judgment may not simply rely on the pleadings or mere denials of the allegations. Rather, the opposing party must adduce some evidence showing that material facts are in issue. *Anderson*, 477 U.S. at 256. "Rule 56(c) therefore requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the depositions, answers to interrogatories, and admissions on file designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *See also Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Eleventh Circuit has restated the method for allocating burdens in a summary judgment motion. Specifically, in accordance with U.S. Supreme Court precedent,

> The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

III. DISCUSSION

Ms. Graff's complaint contains two statutory counts, one arising under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e, *et seq.*, and one under the Florida Civil Rights Act of 1992, Fla. Stat. § 760. The Court will treat these two counts together.[5] *See Blount v. Sterling Healthcare Group,* 934 F. Supp. 1365, 1370 (S.D. Fla. 1996) (following Title VII jurisprudence in evaluating FCRA claims). Plaintiff has also alleged various common law theories arising under Florida law, such as negligent retention and training, intentional infliction of emotional distress, and battery. The Court will begin with a discussion of the statutory claims.

A. The Statutory Claims

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1). A Title VII plaintiff may recover against her employer by demonstrating that she was required "to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *see also Henson v. City of Dundee,* 682 F.2d 897, 902 (11th Cir. 1982) ("A pattern of sexual harassment inflicted upon an employee because of her sex

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[5] The joint disposition of Counts I and II obviates any need to discuss defendant's argument that Ms. Graff failed to exhaust her administrative remedies for purposes of bringing a FCRA claim.

is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment."). On this motion for summary judgment, defendants do not claim that plaintiff has failed to establish a genuine issue of material fact as to whether or not she was subjected to a hostile work environment.

Rather, defendants claim that plaintiff has failed to meet the fifth prong of the *Henson* test — respondeat superior. "Where . . . the plaintiff seeks to hold the employer responsible for the hostile environment created by the plaintiffs supervisor or co-worker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Henson,* 682 F.2d at 905; *see also Huddleston v. Roger Dean Chevrolet,* 845 F.2d 900 at 904 (11th Cir. 1988). The standard for corporate liability in hostile environment cases should not be confused with the standard for corporate liability in *quid pro quo* cases, where the employer is strictly liable for the acts of its agents. *See Sparks v. Pilot Freight Carriers, Inc.,* 830 F.2d 1554, 1558-60 (11th Cir. 1987).

> Strict liability is illogical in a pure hostile environment setting. In a hostile environment case, no *quid pro quo* exists. The supervisor does not act as the company; the supervisor acts outside "the scope of actual or apparent authority to hire, fire, discipline, or promote." Corporate liability, therefore, exists only through *respondeat superior*; liability exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor.

Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989), *citing Henson*, 682 F.2d at 905 (further citations omitted).[6]

Plaintiff does not claim that V & M should be directly or strictly liable for the actions of the Sargent brothers. Instead, she appears to argue that the notice to Mr. Sutton constitutes notice to V & M (thus fulfilling the "knew or should have known" requirement), and that the investigation undertaken by Mr. Nix was deficient. In order to support plaintiff's claim that V & M received notice of her complaints through her discussions with Mr. Sutton, plaintiff must prove that "she complained to higher management of the problem or [must demonstrate] that the harassment was so pervasive that an inference of constructive knowledge arises." *Huddleston*, 845 F.2d at 904; *see also Kilgore* v. *Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996) (no notice to corporation where plaintiff did not complain to higher management). Plaintiff apparently chooses the actual notice route, because she focuses on Mr. Sutton's job responsibilities in an attempt to establish that he served as "higher management" of V & M. This requires the Court to consider the question of who counts as "higher management" in a closely held corporation such as V & M.

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[6] The Court notes that a panel of the Eleventh Circuit recently dealt with many of *the respondeat superior* issues presented in this case in *Faragher v. Cit of Boca Raton*, 76 F.3d *1155* (11th Cir. 1996). The full court subsequently vacated the panel's decision, and ordered rehearing en banc. 83 F.3d 1346 (11th Cir. 1996). Despite the temptation to divine clues from the full court's action, this Court must disregard the *Faragher* opinion altogether. *See* 11th Cir. R. 35-1 1 ("Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and stay the mandate.").

Because the Eleventh Circuit has never announced a definition of what constitutes "higher management," the Court must attempt to extrapolate some guidance from the holdings of various of various cases in which the Eleventh Circuit has alluded to the "higher management" standard. In *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 490 (11th Cir. 1996), the most recent decision on point, the court held that an area supervisor with responsibility for multiple restaurants, a store manager, an assistant store manager, and a dining room supervisor did not constitute "higher management."[7] In *Kilgore*, the court held, without explanation, that a Pizza Hut manager was not "higher management" of the defendant corporation, which managed the restaurant where plaintiff was employed. 93 F.3d at 754. Finally, in *Cross v. State of Alabama*, 49 F.3d 1490, 1507 (11th Cir. 1995), the court held that plaintiffs, employees of a facility run by the Alabama State Department of Mental Health and Mental Retardation would have had to report to the Department's Commissioner or Associate Commissioner in order to put "higher management" on notice of the discriminatory conditions.[8]

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[7] The Court nonetheless found constructive notice to the corporation under the "pervasiveness" doctrine. 97 F.3d at 490.

[8] *In Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503, 1512 (11th Cir. 1998), a race discrimination case, the court upheld the sufficiency of the evidence for a finding of notice to higher management without identifying who qualified as higher management. Additionally, in *Davis v. Monroe County Bd. of Educ.*, 74 F .3d 1186, 1195 (11th Cir. 1996), a panel of the Eleventh Circuit held that a school principal constituted "higher management" of the County Board of Education. The full court has now granted rehearing en banc and vacated the panel's opinion. 91 F.3d 1418 (11th Cir. 1996).

(continued...)

Whatever pattern appears from these cases provides little help to the Court in the present case. In each of these Eleventh Circuit cases, the defendant corporation or state agency was significantly larger than V & M, and had multiple levels of managerial officers. V&M is a Subchapter S corporation with an average of sixty employees at any one time. Nix Depo. at 6-7. Mr. Nix makes all the hiring and firing decisions. Although Mr. Sutton would handle initial complaints regarding sexual harassment, Ms. Graff does not dispute that Mr. Nix instructed his female employees to report incidents of sexual harassment to him personally if reports to Mr. Sutton failed to ameliorate the conditions. The closeness and informal operation of V & M distinguishes it from any of the Eleventh Circuit cases cited above. An analogy between V & M and Shoney's, Pizza Hut, Monroe County, Southern Bell, and The State of Alabama would doubtlessly prove fruitless.

The determination of who counts as higher management must turn not only on the size of the corporation, but on the degree to which the highest manager in the corporation delegates the role of ombudsman to subordinates. The "higher management" inquiry evidently is calculated to place liability on the corporation when a person in the corporation who could have terminated the inappropriate behavior learned of the behavior but failed to bring it to an end. In this case, two factors compel the conclusion that Mr. Sutton was not "higher management." First, because he lacked the authority to fire the Sargent brothers, he had limited power to bring an end to their alleged misbehavior. Stern

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[8](...continued)

reprimands are poor substitutes for pink slips. Second, Ms. Graff herself seemed to recognize that her complaint ultimately should be lodged with Mr. Nix himself. After complaining three times to Mr. Sutton, she went to Mr. Nix and complained of her mistreatment, as Mr. Nix had instructed her to do. Under these circumstances, the Court holds that, as a matter of law, Mr. Sutton was not higher management for purposes of imputing notice to V & M.[9]

Plaintiff complains that she attempted to contact Mr. Nix prior to the August 15 meeting, and that he delayed scheduling a meeting with her. However, the record clearly indicates that Ms. Graff spoke with Mr. Nix during, the time period when she allegedly was being sexually harassed, and that she did not raise the issue of sexual harassment to him at that time. Graff Depo. at 5 1. Accordingly, the Court will consider August 10 of 1994, when Mr. Sutton contacted Mr. Nix regarding the alleged rape threat, Nix Depo. at 46, as the date on which V & M first received notice of the sexual harassment charges. Based on this holding, the Court can quickly dispose of plaintiff's argument that V & M's response to the charges was insufficient.

At the time Mr. Nix first received notice of

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[9] If Mr. Sutton was not higher management, Dave Sargent, a foreman, clearly was not higher management either. Also, at oral argument counsel for plaintiff suggested that Ms. Graff had addressed her complaint to Mr. Nix's daughter during a telephone conversation, and that this should count as notice to the corporation. The record, however, does not indicate that Mr. Nix's daughter was employed by V & M in any capacity that would make her "higher management" of the corporation, and the mere fact that she was related to Mr. Nix cannot make up for this deficiency.

plaintiff's allegations, he was away on vacation, and took the only reasonable action under the circumstances — separating Ms. Graff from the Sargent brothers until his return. Upon his return, he met with Ms. Graff, and heard her version of the story. The Court believes that the inquiry into the appropriateness of V & M's response must end there. Although plaintiff criticizes Mr. Nix's subsequent investigation into her charges, the Court fails to understand the relevance of this allegation. After the August 15 meeting, Ms. Graff left on vacation and never returned to work at V & M. Even assuming that the company's response was completely inappropriate, and never returned to work at V & M. Even assuming that the company's response was completely inappropriate, it never impacted on the "compensation, terms, conditions, or privileges" of plaintiff's employment when she was not longer on the job to reap the possible benefits of remedial action. Ms. Graff voluntarily terminated her employment with V & M before the company even had time fully to investigate her claims, much less to remedy the situation. *See Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 262 (4th Cir. 1996) (Where employee put employer on notice of her sexual harassment complaint the same day she quit work, employer could not be liable, because it had no opportunity to take prompt and remedial action.). Because none of the sexual harassment allegedly experienced by Ms. Graff resulted from a failure by V & M to provide a workplace free from sexual harassment, she may not hold V & M liable for a violation of Title VII.

B. The Common Law Claims

Having granted summary judgment on the Title VII claim, and the identical FCRA claim, the Court will dismiss the remaining common law counts without prejudice. *See United Mine Workers v. Gibbs*, 383 U.S.

715, 726 (1966) ("[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."); *see also Hardy v. Birmingham Bd. of Educ.*, 954 F.2d 1546 (11th Cir. 1992) (District Court, abused its discretion in failing to dismiss pendent state law claims after granting summary judgment on section 1983 claim). Although some of the counts raise *respondeat superior* issues analogous to the ones raised in the statutory counts, the negligent training and retention count would move the Court into an inquiry completely separate from the one required by the statutory counts. Recognizing that "[s]tate courts, not federal courts, are the final expositors of state law," *Hardy*, 954 F.2d at 1553, the Court will not entertain the pendent common law counts.

CONCLUSION

The Court has considered the motion, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that

1. Defendant's Motion for Summary Judgment **[DE 24]** be, and the same is hereby **GRANTED as to Counts I and II of the Complaint.** Final Judgment shall be entered by separate Order;

2. Plaintiff's Motion to Strike **[DE 45]** be, and the same is hereby **DENIED.**

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 19 day of March, 1997.